(1)

Supreme Court, U.S.
FILED

961533 JAN 23 1997

No. _____ OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

LARRY SAULSBERRY,

Petitioner,

V.

STATE OF MISSISSIPPI,

Respondent.

Petition For A Writ Of Certiorari
To The Mississippi Supreme Court

PETITION FOR A WRIT OF CERTIORARI

David L. Walker
Counsel of Record
Law Offices of David L. Walker
P. O. Box 719
Batesville, MS 38606
(601) 563-2514

Counsel for Petitioner

24 pp

QUESTIONS PRESENTED FOR REVIEW

The following questions are presented for review:

(1). Whether the Petitioner's Fourteenth Amendment to the United States Constitution right to equal protection was violated by Respondent's peremptory strikes of prospective black jurors.

(2). Whether the Petitioner's Eighth Amendment to the United States Constitution right to be free of cruel and unusual punishment was violated by the imposition of a thirty year sentence without parole, good time, etc.

(3). Whether the Petitioner's Fifth and Fourteenth Amendment rights to due process were violated by failing to grant Petitioner's motion for a mistrial after Officer Thompson testified that Petitioner advised him that he had two prior felony convictions because this testimony was not revealed to Petitioner during discovery.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iii

OPINIONS DELIVERED BY LOWER COURT.....1

CONSTITUTIONAL PROVISIONS INVOLVED IN CASE.....2

STATEMENT OF THE CASE.....2

ARGUMENTS FOR ALLOWANCE OF WRIT.....3

APPENDIX.....ia

Table of Contents.....ia

TABLE OF AUTHORITIES

Page

CASES

Batson v. Kentucky, 476 U.S. 79(1986)..... .....3, 4, 5

Solem v. Helms, 463 U.S. 277,
103 S.Ct. 3001, 77 L. Ed. 2d 367(1983).....6

Swain v. Alabama,
380 U.S. 202, 203-04(1965).....4

STATUTES

Miss. Code Ann. (1972), § 99-19-81.....6

UNITED STATES CONSTITUTION

Amendment 5.....2, 7

Amendment 6.....2

Amendment 8.....2, 5

Amendment 14.....2, 7

PETITION FOR A WRIT OF CERTIORARI

COMES NOW, the Petitioner, Larry Saulsberry, by and through counsel, David L. Walker, and hereby petitions the Court for writ of certiorari.

OPINION DELIVERED BY LOWER COURT

On October 24, 1996, the Mississippi Supreme Court affirmed the Petitioner's conviction for possession with intent to distribute a controlled substance, cocaine. The Petitioner's Petition for Rehearing was denied by the aforesaid Court on December 19, 1996.

GROUNDS FOR JURISDICTION

The Court has jurisdiction in that this is a petition for a writ of certiorari from a criminal conviction alleging violation of the Petitioner's constitutional rights and involves an opinion issued by the Mississippi Supreme Court issued on October 24, 1996, an a motion for rehearing denied on December 19, 1996, by the aforesaid Court. Please refer to Exhibit "A" attached hereto.

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner alleges that his constitutional rights as set out in the Fifth, Sixth, Eighth, and Fourteenth

Amendments of the United States Constitution have been violated.

STATEMENT OF THE CASE

The Petitioner was indicted on July 23, 1992, by a grand jury of Marshall County, Mississippi for the crime of possession of a controlled substance, cocaine, with the intent to distribute. He was tried on August 25, 1993. He Waved arraignment on August 17, 1992. His first trial ended in a mistrial on May 26, 1993. The jury returned a verdict of guilty of possession of a controlled substance, cocaine, with intent to sell, transfer, or distribute. The circuit court judge sentenced the Petitioner to thirty years in an institution to be designated by the Department of Corrections without parole. The Petitioner's Motion for a New Trial was denied on September 7, 1993, by the circuit court judge.

The Petitioner was a passenger in a vehicle that was stopped by a Mississippi Highway Patrol Officer based on the fact that one of the car's headlights was non-operational. The officer recovered a plastic bag containing rocks of cocaine from Petitioner's mouth.

ARGUMENT FOR ALLOWANCE OF WRIT

The Petitioner's *Batson* challenge of peremptory strikes should have been sustained by the trial court. Petitioner meets the criteria for *Batson* in that:

(1). he is a member of a cognizable race group;

(2). the prosecutor has exercised peremptory challenges toward the elimination of veniremen of his race; and

(3). the facts and circumstances infer that the prosecutor used his peremptory challenges for the purpose of striking minorities. *Batson v. Kentucky,* 476 U.S. 79(1986). *Batson* provides that purposeful racial discrimination may be shown by the illicit use of a single jury strike in a single case.

In *Swain v. Alabama,* 380 U.S. 202, 203-04(1965), the U.S. Supreme Court held that the State may not purposefully exclude blacks from a jury solely on account of race.

The Petitioner is an African-American or black American. The Respondent exercised its first and second peremptory challenges against prospective black jurors, Terry Faulkner and Ethel Lee Ingram. Mr. Faulkner was struck because he was unmarried, lived in the same area as the Petitioner and was a member of an age group that the Respondent should be considered. Ms. Ingram was struck because she lived in the same neighborhood as the

Petitioner, was a friend of the Petitioner's mother and is in the same age group as the Petitioner's mother. Respondent had accepted another prospective juror the same age as Mr. Faulkner and one prospective juror who was one year younger than Mr. Faulkner. The trial court judge accepted the Respondent's explanations and rejected the Petitioner's challenges. Respondent exercised its third strike against Cal Rayford. Petitioner asserted a *Batson* challenge and the Respondent stated that its reasons for striking prospective juror Rayford were that she lived in the same locality as Petitioner; her son was under indictment for a drug charge and she was very close to Petitioner's mother. Respondent also exercised a peremptory challenge against Edwin Burton. Respondent indicated that this prospective juror was struck because he had a friend charged with rape and burglary and he testified for a friend who had been charged with a crime in another state. Trial court judge overruled Petitioner's objections.

The Petitioner respectfully submits that the Respondent did not articulate racially neutral reasons for striking the aforesaid jurors as required by *Batson*.

Petitioner also argues that the sentence of thirty years without benefit of parole, good time, etc. imposed upon Petitioner by the trial court judge was cruel and unusual punishment and disproportionate to the crime for which the jury convicted Petitioner pursuant to the Eighth

Amendment to the U.S. Constitution. After the jury returned its verdict of guilty of possession of a controlled substance with intent to distribute, the circuit court judge sentenced the Petitioner to thirty years in an institution designated by the Mississippi Department of Corrections without benefit of parole. The Petitioner was forty-three years old at the time he was sentenced. He was disabled because of a broken back that he suffered while at work. Notwithstanding the habitual offender statute, § 99-19-81 Miss. Code Ann. (1972) requiring that habitual offenders sentenced to the maximum term, the trial court has authority to review the habitual offender sentence in light of constitutional principles of proportionality and to reduce the sentence to less than maximum sentence set forth in the sentencing statute. A criminal sentence must not be disproportionate to the crime for which the defendant is sentenced. *Solem v. Helms,* 463 U.S. 277, 103 S.Ct. 3001, 77 L. Ed. 2d 367(1983). The circuit court judge apparently conducted a proportionality analysis in considering the sentence of the Petitioner because he did not sentence him to sixty years in the MDOC without benefit of probation of parole. However, the Petitioner urges the Court to hold that his sentence is still disproportionate to the crime for which he was convicted by the jury as well as being cruel and unusual punishment based on his age, life expectancy and health status.

Petitioner also argues that he was deprived of his fundamental right to a fair trial and due process of law guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States of America when the trial court failed to grant a mistrial after Trooper Thompson testified that Petitioner advised him that Petitioner had two priors. Petitioner objected to this testimony on the grounds that it referred to prior criminal activity, and was not disclosed in discovery. The fact that the damaging testimony was elicited during cross examination is no excuse for the failure to have disclosed that this testimony existed.

Wherefore, the Petitioner hereby petitions the Court for writ of certiorari.

Respectfully submitted,

This the 7th day of MARCH, 1997.

David L. Walker
(Counsel of Record)
Law Offices of David L. Walker
P.O. Box 719
Batesville, MS 38606
601-563-2514
MS Bar Number: 06896

Counsel for Petitioner

APPENDIX

Table of Contents

Order of the Supreme Court of Mississippi denying petitioner's motion for rehearing.....1a

SUPREME COURT OF MISSISSIPPI

Linda Stone, Clerk
Third Floor Gartin Building
450 High Street
P.O. Box 249
Jackson, Mississippi 39205-0249

December 19, 1996

Deputy Clerks
Kathy Gillis
Bettye Malanchak

Telephone:
601/359-3694
Fax:
601/359-2407

David L. Walker
Panola County Public Defender
P.O. Box 719
Batesville, MS 38606-0719

This is to advise you that the Mississippi Supreme Court rendered the following decision on the 19th Day of December, 1996.

Supreme Court Case #93-KA-1040
Trial Court Case #MK92049

Larry Saulsberry
vs.
State of Mississippi

Motion for Rehearing denied. Sullivan, P.J., Banks and McRae, JJ., would grant.

Supreme Court Clerk

lwp

ccs: AG notified via list
Marshall County Circuit Clerk

*Notice to Chancery/Circuit/County Court Clerks
If any original of any exhibit other than photos was sent to the Supreme Court Clerk and should now be returned to you, please advise this office in writing immediately.

EXHIBIT "A"

IN THE SUPREME COURT OF MISSISSIPPI

NO. 93-KA-01040-SCT

LARRY SAULSBERRY

DECIDED
OCT 24 1996

V.

STATE OF MISSISSIPPI

NOT DESIGNATED FOR PUBLICATION

TRIAL JUDGE:	Hon. Henry Lafayette Lackey
COURT FROM WHICH APPEALED:	Marshall County Circuit Court
ATTORNEY FOR APPELLANT:	David L. Walker Panola County Public Defender P.O. Box 719 Batesville, MS 38606-0719
ATTORNEYS FOR APPELLEE:	W. Glenn Watts, Spec. Ass't AG Wayne Snuggs, Ass't AG P.O. Box 220 Jackson, MS 39205
NATURE OF THE CASE:	Possession of controlled substance, cocaine, with intent to distribute
DISPOSITION:	Affirmed

BEFORE DAN LEE, C.J., McRAE AND SMITH, JJ.

DAN LEE, CHIEF JUSTICE, FOR THE COURT:

Larry Saulsberry was arrested on the evening of April 28, 1992, by Mississippi Highway Patrol Officer Alan

Thompson for possession of cocaine with the intent to distribute transfer or sell. Thompson stopped the car in which Larry Saulsberry was riding with his nephew Connie Saulsberry, upon observing that one of the car's headlights was non-operational. After stopping the car, Thompson noticed the occupants frantically moving about inside the car. Thompson had the car's occupants exit the car, and he noticed that Larry appeared to have something plastic protruding from his mouth. Thompson asked Larry what was in his mouth, but Larry's reply was garbled due to the plastic object in his mouth. When Larry complied with Thompson's request to remove the plastic object from his mouth, Thompson observed that it was a plastic baggie containing what appeared to be individually wrapped pieces of crack cocaine. Thompson then recovered the baggie containing twenty-one rocks of cocaine individually wrapped in foil and placed Larry Saulsberry under arrest.

At trial the state crime lab chemist testified that the twenty-one individually wrapped rocks taken from Larry Saulsberry were indeed crack cocaine. Roy Sandifer, an agent with the Mississippi Bureau of Narcotics, testified that in his experience the packaging of the twenty-one rocks, each individually wrapped in foil, indicated that the crack was intended for resale rather than for personal consumption. Larry Saulsberry testified that the cocaine was not his but belonged to his nephew Connie. Moreover,

Larry testified that he was going to give the cocaine back to Connie after the traffic stop.

During the jury's deliberations, Larry Saulsberry's status as an habitual offender was adjudicated. The jury returned a guilty verdict, and the trial judge sentenced him to serve thirty years in the custody of the Mississippi Department of Corrections. His thirty-year sentence is to be served without the possibility of parole, probation or early release due to the fact that he was sentenced as an habitual offender. Aggrieved by his conviction and sentence, Larry Saulsberry assigns the following as error:

I. WHETHER THE VERDICT OF THE JURY FINDING THE APPELLANT GUILTY OF POSSESSION OF A CONTROLLED SUBSTANCE (COCAINE) WITH INTENT TO DISTRIBUTE, TRANSFER, ETC., WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE BECAUSE THE APPELLEE ONLY PRESENTED EVIDENCE AT THE TRIAL CONCERNING THE PACKAGING AND QUANTITY OF THE COCAINE ON THE ISSUE OF INTENT TO DISTRIBUTE, TRANSFER, ETC.

II. WHETHER THE CIRCUIT COURT JUDGE ERRED IN FAILING TO GRANT APPELLANT'S MOTION FOR A MISTRIAL AFTER TROOPER THOMPSON TESTIFIED THAT THE APPELLANT ADVISED HIM THAT HE HAD TWO PRIOR FELONY CONVICTIONS BECAUSE THIS TESTIMONY WAS NOT REVEALED TO THE APPELLANT DURING DISCOVERY AND THE CIRCUIT COURT JUDGE DID NOT CONDUCT A PETERSON HEARING. (*sic*) ON THE ISSUE OF THE APPELLANT'S PRIOR CONVICTION.

III. WHETHER THE CIRCUIT COURT JUDGE ERRED IN FAILING TO SUSTAIN THE APPELLANT'S (*sic*) STRIKES OF PROSPECTIVE BLACK JURORS.

IV. WHETHER THE CIRCUIT COURT JUDGE'S IMPOSITION OF A THIRTY YEAR SENTENCE WITHOUT PAROLE, GOOD TIME, ETC. IS CRUEL AND UNUSUAL PUNISHMENT AND DISPROPORTIONATE TO THE CRIME FOR WHICH THE JURY CONVICTED THE APPELLANT.

I.

Larry Saulsberry argues that the evidence adduced at trial was legally insufficient to convict him of possession of a controlled substance with intent to distribute. Specifically, he argues that the only real evidence the State has to convict him of possession of a controlled substance with intent to distribute is the quantity of cocaine taken from a plastic baggie that he had in his mouth.

"To determine whether a jury verdict is against the overwhelming weight of the evidence, we view all of the evidence in the light consistent with the verdict and we give the State all favorable inferences which may be drawn from the evidence." ***Strong v. State,*** 600 So. 2d 199, 204 (Miss. 1992).

The State was charged with proving beyond a reasonable doubt the charges of Larry Saulsberry's indictment: that he had in his unlawful possession a controlled substance (Miss. Code Ann. § 41-29-115

(A)(a)(4)) with the unlawful intent to "sell, transfer or distribute" it. *See* Miss. Code Ann. § 41-29-139 (1972).

In ***Miller v. State,*** 634 So. 2d 127, 129 (Miss. 1994), we quoted the following from ***Springfield v. State,*** 588 So. 2d 438, 440 (Miss. 1991), regarding possession of a controlled substance with intent to distribute:

> [P]roof of possession with an intent to distribute solely upon surmise or suspicion. *There must be evidentiary facts which will rationally produce in the minds of jurors a certainty, a conviction beyond reasonable doubt that the defendant did in actual fact intend to distribute or sell the cocaine,* not that he *might* have such intent. It must be evidence in which a reasonable jury can sink its teeth.

(Emphasis added). Larry Saulsberry concedes that the evidence was sufficient to support a conviction of possession of cocaine but argues that there was insufficient evidence to establish his intent to distribute beyond a reasonable doubt. Miss. Code Ann. § 41-29-139(a)(1) (1972), under which Larry Saulsberry was indicted, provides that it is unlawful for any person to sell or transfer or distribute cocaine. We find that he focuses on the "sale" aspect of statute rather than on the "transfer" or "distribute" language.

In ***Rogers v. State,*** 599 So. 2d 930, 934 (Miss. 1992), this Court stated the following regarding the

"distribute" element contained in Miss. Code Ann. § 41-29-139:

> The word "distribute" as stated in the statute and the indictment includes transactions which are sales as well as transactions which may not be considered sales.

Saulsberry's argument that the record lacks evidence which would allow a jury to find that he intended to distribute the cocaine overlooks his own testimony that he was going to give, *i.e.*, "transfer" the cocaine back to Connie when Thompson completed his traffic stop.

Taking the evidence and reasonable inferences drawn from that evidence in the light most favorable to the judgment, we hold that the evidence was sufficient to convict Larry Saulsberry of possession of a controlled substance with intent to distribute or transfer. Thus, we find no merit to Larry Saulsberry's first assignment of error.

II.

During Larry Saulsberry's cross-examination, while testifying about the remarks made by Larry and Connie at the time of their arrests regarding ownership of the cocaine, Trooper Alan Thompson mentioned that Larry told Connie, "Look, I've already got one or two priors...you need to take...the rap." Larry Saulsberry moved for a mistrial, which was denied. This denial of the motion for a mistrial is the subject of this assignment of error.

Saulsberry argues that during discovery Trooper Thompson did not present to his attorney this oral statement regarding "priors". Moreover, Saulsberry argues that he was surprised by this answer during Thompson's cross-examination and, thus, he was deprived of the opportunity to have a ***Peterson***[1] hearing conducted to determine the relevancy of his prior convictions.

The decision whether to grant a mistrial is entrusted to the trial judge's sound discretion. ***Brent v. State***, 632 So. 2d 936, 941 (Miss. 1994). To find error from a trial judge's failure to grant the motion for mistrial, we must be able to say that the trial judge abused his discretion. ***Id.***

The State argues that Larry Saulsberry was not entitled to a mistrial and should not be heard to complain since it was his questioning of the witness that led to the complained-of response. In ***Brown v. State***, 534 So. 2d 1019, 1024 (Miss. 1988), the defense, on cross-examination asked two detectives what type of pictures they were searching for in the defendant's home. Each detective responded that they were looking for pictures of "other victims." In both instances Browns motion for a mistrial was denied. On appeal we rejected Brown's argument that the trial court erred in refusing to grant his motion for a mistrial, stating "[a]ny impropriety in these responses was elicited in

---

[1] ***Peterson v. State,*** 518 So. 2d 632 (Miss. 1987).

response to Brown's own questions, therefore he cannot complain of the answers." ***Brown***, 534 So. 2d at 1024. We find that our own holding in ***Brown*** holds and that, since any impropriety in Thompson's response was elicited by Saulsberry, Saulsberry cannot complain of that impropriety. Accordingly, we find no merit to this assignment of error.

III.

Saulsberry, who is black, argues that the prosecution's use of four of its peremptory strikes violates ***Batson v. Kentucky***, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). In order to pursue a ***Batson*** claim the defendant must show:

1. He is a member of a cognizable racial group;

2. The prosecution exercised peremptory challenges toward the elimination of veniremembers of his race; and

3. The facts and circumstances infer that the prosecutor used his peremptory strikes for the purposes of striking minorities.

Id. at 96. Once the defendant successfully establishes a *prima facie* case, the party desiring to exercise the peremptory strikes has the burden of offering a race-neutral reason for striking the potential juror. ***Id.*** at 97-98. The trial court must then determine whether the objecting party has met that burden and demonstrated that the strike was the

result of purposeful discrimination. ***Griffin v. State***, 610 So. 2d 354, 356 (Miss. 1992).

In ***Stewart v. State***, 662 So. 2d 552, 558 (Miss), we stated "the establishment of a race neutral reason is not a difficult task." Moreover, this Court affords the trial court great deference in determining whether the explanation offered under the unique circumstances of the case is a truly race-neutral reason. ***Stewart,*** 662 So. 2d at 558 (citing ***Lockett v. State,*** 517 So. 2d 1346, 1351 (Miss. 1987)).

In the case at bar, the prosecutor accepted four blacks as jurors and used four of his peremptory strikes to remove blacks. Assuming *arguendo* that Saulsberry has established a *prima facie* case under ***Batson,*** the trial court found that the prosecution's reasons for exercising its peremptory strikes were race-neutral, and we concur. Upon reviewing the transcript of the jury selection process and in light of our standard of review, we cannot say that the trial judge's findings were clearly erroneous or against the overwhelming weight of the evidence. ***Hatten v. State,*** 628 So. 2d at 299. Accordingly, Saulsberry merits no relief on this assignment of error.

IV.

Saulsberry was indicted as an habitual offender and charged with violation of Miss. Code Ann. § 41-29-115(A)(a)(4) and 41-29-139. The trial judge adjudicated Saulsberry an habitual offender and sentenced him to thirty

years in the custody of the MDOC without the benefit of parole, probation or early release. Saulsberry argues that this sentence was disproportionate to the crime for which he was convicted.

Saulsberry cites ***Solem v. Helm,*** 463 U.S. 277 (1983), in his brief and concedes that the trial judge apparently conducted a proportionality analysis review since he sentenced him to thirty years and not sixty without the benefit of parole, probation or early release. The trial judge could have doubled Saulsberry's thirty-year sentence since he was indicted under Miss Code Ann. § 41-29-147. Saulsberry simply argues that his punishment is disproportionate but offers no real argument to support this contention.

This Court has consistently and recently held that it will not disturb as disproportionate a sentence imposed by the trial court within the limits of the appropriate statute, and that extended proportionality analysis, applying the three prongs of ***Solem,*** is not constitutionally required unless the sentence is "manifestly excessive to the crime committed." ***Hart v. State,*** 639 So. 2d 1313, 1319 (Miss. 1994); ***Stromas v. State,*** 618 So. 2d 116, 123 (Miss. 1993); ***Edwards v. State,*** 615 So. 2d 590 (1993); ***Wallace v. State,*** 607 So. 2d 1184 (Miss. 1992). In ***Hart*** the Court upheld a sentence of twenty years and a fine of $250,000 for possession with intent to sell thirty-five pounds of

marijuana. In ***Edwards*** we affirmed the defendant's conviction and sentence in which he received twenty-five years fir possession with intent to sale 5.7 grams of cocaine. In ***Stromas*** we affirmed Stromas's conviction for the sale of a small amount of cocaine and sixty year sentence wherein the defendant had previously been convicted of a sale of marijuana.

Larry Saulsberry had previously been convicted of two felonies that brought him under the habitual offender statute. The trial court adjudicated him an habitual offender and sentenced him accordingly. The sentence was within the statute, and Saulsberry has not demonstrated in any way that the punishment is disproportionate. Therefore, we find that Saulsberry merits no relief on this assignment of error.

Accordingly, Larry Saulsberry's conviction and sentence are affirmed.

CONVICTION OF POSSESSION OF CONTROLLED SUBSTANCE, COCAINE, WITH INTENT TO DISTRIBUTE AND SENTENCE OF THIRTY (30) YEARS AS AN HABITUAL OFFENDER PURSUANT TO MISS CODE ANN. § 99-19-81 (1972) IN CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AFFIRMED.

PRATHER, P.J., PITTMAN, ROBERTS, SMITH AND MILLS, JJ., CONCUR. McRAE, J., CONCURS IN RESULT ONLY. BANKS, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY SULLIVAN, P.J.

IN THE SUPREME COURT OF MISSISSIPPI

NO. 93-KA-01040-SCT

LARRY SAULSBERRY

v.

STATE OF MISSISSIPPI

NOT DESIGNATED FOR PUBLICATION

BANKS, JUSTICE, DISSENTING:

I am compelled to dissent because the majority opinion wholly fails to deal with the discovery violation issue raised by the defendant. The suggestion that ***Brown v. State,*** 534 So. 2d 1019 (Miss. 1988) controls is simply wrong. The fact that the damaging testimony was elicited during cross-examination is no excuse for the failure to have disclosed that this testimony was a possibility, that is, that it existed at all. Our discovery rules require disclosure of the "substance of any oral statement made by the defendant." URCCC Rule 9.04 A. 2. The evidence here involved was clearly a statement made by the defendant. It is the pretrial failure to disclose this statement that is at issue here, not the use of evidence at trial not otherwise admissible as in ***Brown.*** No discovery violation was at issue in ***Brown.***

SULLIVAN, P.J., JOINS THIS OPINION.